COUNTRY REPORT
ITALY

Distribution

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1. LEGAL SOURCES.

What are the rules governing distribution agreements (if any) in your country?

There is no specific legislation regarding distribution contracts. Within the 1942 civil code an attempt has been made to regulate distribution contracts under the rules of the supply contract («contratto di somministrazione»), a type of contract covering a continuative sale of goods or services, by providing some rules on exclusive supply agreements with the intent to cover also the typical distribution contracts (at that time commonly called «vendita in esclusiva»). However, although part of the scholarship and case-law considers the distribution contract as a particular type of supply contract, the majority opinion is in favour of qualifying the distribution contract (commonly called «contratto di concessione di vendita») as an «atypical» contract, i.e. a contract not directly regulated by law.

The opinion prevailing at present is to consider the distribution contract as a «framework contract» («contratto quadro») whereby the distributor agrees to promote the sale of the supplier's products which he will purchase through separate contracts of sale.

As regards the problem of filling possible gaps left by the parties, the courts tend to apply the rules of similar contracts, as we will see later.

2. NOTION OF DISTRIBUTOR.

2.1 Distinctive criteria with respect to commercial agents.

Are agents distinguished from distributors under the law of your country? If yes, what are the distinctive criteria?

Under Italian case law the distinction between distributor and commercial agent is very clear. The fact that the distributor buys and resells in his own name makes it impossible to qualify him as agent, since the agent's activity is that of an intermediary. Except for some very old cases, the similarity between the two contracts (from the point of view of the distribution activity) is not considered relevant: an agent who promotes the conclusion of contracts and is paid with a commission cannot be confused with a distributor who acts as buyer-reseller[1] and is remunerated through a margin.

Are the rules on commercial agents applicable, in special circumstances, also to distributors acting as buyers-resellers?

There are no precedents in recent years where rules on commercial agents have been applied to distributors acting as buyers-resellers; in some cases, Italian Courts have applied by analogy the rules on termination by notice to a distribution contract[2].

2.2 Distributors carrying out an accessory activity as intermediary.

Is it admissible to foresee, within a distributorship contract, that the distributor may also act as an intermediary?

In principle such a solution is admissible, but problems may arise as to the legal qualification of the contract if such activity is not merely secondary.

If such activity as intermediary remains accessory, can it be considered as consistent with the distribution agreement? In case such activity becomes more important, when can the contract no more be considered as a distribution agreement

If the activity is secondary and accessory, such activity can be considered to be consistent with the distribution agreement and the contract will continue to be a distribution agreement.

If the intermediation activity becomes more important, the Courts may consider the existence of two contracts or of a «mixed» contract with application of the rules governing the respective contract to each part.

Should the activity as intermediary be the prevailing one, there is a risk that the contract in its whole may be qualified as commercial agency, but there are no clear precedents on this point. In one old case, where the parties had concluded an agency contract, but the «agent» actually acted mainly as reseller, the Supreme Court has qualified the accessory intermediation activity as «procacciamento d'affari» (occasional intermediation) and not as commercial agency[3].

Would Article 2.3 of the IDI model be lawful and effective under the law of your country? Is there a risk that the distributor may be qualified as an

[1] Cass. 6 June 1989, n. 2742, *Nunzi* v. *soc. Sol,* in *JurisData, sent. cass. civ.* See also Cass. 20 January 2006, n. 1077, *S.P. v. SpA la Scuola*, in *JurisData, sent. cass. civ.*

[2] In Cass. 17 June 2011, n. 13394 a six months' notice has been granted to the distributor by analogical application of the rules provided for commercial agents (the distribution contract had lasted for twelve years); in Trib. Bergamo, 5 August 2009, n. 1730 the lower court granted a four months' notice to the distributor, after four years of contractual relationship.

[3] See Cass. 6 March 1987, n. 2382, *Santoro v. SO.GE.MA,* in *JurisData, sent. cass. civ.*

agent? Or that the distributor can invoke the application of rules on agency (e.g. goodwill indemnity) for the part of turnover made as intermediary?

Article 2.3 of the IDI model may be considered as effective under Italian law provided the activity as intermediary remains accessory with respect to the purchase-resale activity.

2.3 Distinctive criteria with respect to simple customers who purchase on a continuative basis

Is it possible, under the law of your country that a customer/importer who has been supplied for a long period of time may be qualified as distributor, in the absence of any contract, on the basis of a factual relationship? In case of affirmative answer, which circumstances would be relevant for assuming the existence of a distribution contract?

Although there are almost no judicial precedents (since most distribution contracts are made in writing and are called by their name), it is reasonable to expect that in case of a long-lasting relationship where the «customer» has performed the typical obligations of a distributor, without written contract, he may be nevertheless qualified as a distributor. This risk is of course higher if the distributor has been indicated (in advertising materials, catalogues, etc.) as the supplier's distributor. In one case in which the distributor was acting as agent of the supplier (and thus had already a continuing relationship with him), but he had also been buying and reselling its products for a period of 12 years without having concluded any written contract to that aim, the Italian Supreme Court stated that he was acting *de facto* as a distributor. Since the supplier had terminated both contractual relationships with immediate effect, the Court recognized the distributor's right to a reasonable notice and granted him damages for a sum equivalent to six months of gross margin[4].

In this respect, it is important to mention the Corman-Collins judgment of the Court of Justice[5], which - for the first time - tries to provide a definition of distribution contracts.

In this judgement, the EU Court affirmed that, if the relationship is limited to the supply of products - even through a long term commercial relationship – the contract remains a purchase and sale agreement; if, on the contrary, the reseller undertakes specific obligations concerning the distribution of products, such agreement may be regarded as a distributorship contract.

However, the Court did not clearly identify those “specific obligations” and therefore we shall wait for the application of those principles by national Courts, in order to see how the distinction between sale and distribution contracts will be assessed in concrete.

2.4 Requirements concerning the performance of the distributor's activity.

Is there any condition required by the laws of your country for being allowed to perform the distribution activity (e.g. citizenship, registration etc.)?

There are no conditions prescribed by law for being allowed to perform the distribution activity.

[4] Cass. 17 June 2011, n. 13394.
[5] European Court of Justice, December 19, 2013, Case C-9/12, *Corman-Collins SA* v. *La Maison de Whisky SA*.

3. CONCLUSION OF THE CONTRACT AND SUBSEQUENT MODIFICATIONS.

3.1 Formalities required by law.

Is any formality (written form, notarisation, registration, etc.) required for the validity of a distribution contract in your country? If yes, what are the consequences of the non observance of the above formalities?

There is no requirement of written form for distribution contracts.

Specific acceptance of onerous conditions contained in non-negotiated contracts. Article 1341 c.c. states that when the contract has been prepared by one party and its contents have not been actually negotiated, possible «onerous clauses» (*clausole vessatorie*) are invalid, unless specifically approved in writing. According to Italian case law specific approval may be given through a second signature under a list indicating the «onerous» clauses contained in the contract.

It should be reminded that these principles apply only to standard contracts prepared by one of the parties which are not actually negotiated. Moreover, the specific approval is normally considered as a form requirement, which implies that the law of the country where the other party is at the moment of conclusion of the contract, if more favourable to the validity of the contact, will prevail (see Article 9 of the Rome convention of 1980, as well as Article 11.2 of EC Regulation 593/2008 – "Rome I Regulation").

3.2 Contractual requirement of written form for modifications.

In case the contract requires the use of writing for possible future amendments, what are the consequences of non observance?

It is very common to have a clause in the contract (like for instance 23.3, first sentence, of the IDI model) providing that all amendments are valid only if made in writing. However, Italian courts normally admit the implicit revocation of such clause through behaviours which are incompatible with it, on the light of the general principle of "freedom of form" applicable to contracts, with the only exception of the contracts for which the law specifically requires the written form[6].

Would Article 23.3, second sentence, of the IDI model contracts (which has been taken from the Vienna convention on international sale) be effective under your law?

As to the clause contained in Article 23.3, second sentence, of the IDI model contracts, such clause would certainly be effective.

3.3 Unilateral contract modifications

Are clauses which give to one party the right to unilaterally modify some essential elements of the distribution contract, such as Article 1.5 of the supplier-friendly IDI model, valid and effective under the law of your country?

There is case law regarding commercial agency contracts, according to which clauses which entitle one party to unilaterally modify essential elements of the contract (like territory, contractual customers, commission) may be invalid, particularly where such clauses are applied without respecting the principle of good faith. Since the above case law is not based on rules regarding agency, but on general principles of contract law, it should also extend to distribution contracts.

In one case regarding the distribution of cars[7], the Supreme Court has not objec-

[6] Cass. 22 March 2012, n. 4541; Cass. 22 August 2003, n. 12344; Cass. 5 October 2000, n. 13277.
[7] Cass. 9 December 2003, n. 18.743, *S.C.A. Commercio Autoveicoli v. Fiat Auto SpA,* in *Guida al Diritto,*

ted to a clause whereby the supplier could fix unilaterally the minimum turnover on the basis of objective criteria after consultation of the distributor.

Regarding the validity of Article 1.5, no clear-cut answer can be given. On the one hand the clause can be considered invalid because it gives to one party the possibility to modify an essential term of the contract; on the other hand, it would seem that, if the clause is applied by the supplier in a reasonable way and the decision is based on objective criteria, there are good chances that the clause would be effective.

3.4 Form requirements and applicable law

How is the law governing the form of the distribution contract to be determined under the law of your country?

Under the EC Rome I Regulation (Articles 11.1 and 11.2), as well as under the Rome convention of 1980 (still applicable to contracts concluded before December 17, 2009 and to contracts with Danish parties), form requirements are evaluated with respect to the most flexible law of those implied. So, if the contract is made *inter absentes*, the *lex causae* and the law of the countries where the parties are domiciled will be considered (and the law fixing less requirements will apply); if the contract is made *inter presentes*, the law of the place of conclusion and the *lex causae* will be considered.

3.5 Information about the parties

Is it required by law (or simply customary in your country) to include in the contract additional specifications (such as registration number, social security number)?

In principle it is sufficient that the parties can be identified without problems: it is customary to refer to the name and address.

4. DISTRIBUTOR'S UNDERTAKING NOT TO COMPETE DURING THE CONTRACT.

4.1 Can the non-competition obligation be implied?

If the contract contains no provision whereby the distributor agrees not to represent or distribute competing products (or if there is no written contract at all), can such an obligation be implied from the distribution contract?

In principle the obligation not to market competing products cannot be implied from the distribution contract and must be expressly agreed between the parties. Consequently the fact of having entered into a distribution agreement is not sufficient for implying that the distributor must avoid selling competitive products.

However, this does not exclude the possibility of a tacit (or oral) agreement, especially if there are several elements showing that the parties actually wanted the distributor not to deal with competing products.

4.2 Extent of the non-competition clause.

Pursuant to your domestic law, parties are free to impose on the distributor an undertaking not to compete during the contract? Are there limitations to such obligation, provided by law or jurisprudence? If yes, to what extent?

2004, 6, 37

There are, in principle no limitations regarding the extent of a non-competition clause.

Is it possible to contractually extend the distributor's non competition obligation to the distribution of non competing goods of competing manufacturers?

It is in principle possible to contractually extend the distributor's non competition obligation to the distribution of non competing goods of competing manufacturers.

Is it possible to contractually extend the distributor's non competition obligation to the distribution of competing goods outside the contractual territory (i.e. an obligation not to represent competitors of the supplier outside the territory)?

It is also in principle possible to contractually extend the distributor's non competition obligation to the distribution of competing goods outside the contractual territory (i.e. an obligation not to represent competitors of the supplier outside the territory).

Would Article 6.1 of the IDI supplier-friendly model contract be in compliance with your legislation?

Article 6.1 of the IDI supplier-friendly model contract is, in principle, consistent with Italian law.

4.3 Distributor engaged for one supplier only.

Is it possible to agree with the distributor that he will distribute only the products of the supplier, and that he will consequently concentrate his activity exclusively on the distribution of the supplier's products?

It is possible to agree with the distributor that he will distribute only the products of the supplier, and that he will consequently concentrate his activity exclusively on the distribution of the supplier's products.

If this is the case, will special rules or principles protecting the distributor be applicable?

There are no special rules or principles protecting the distributor which would be applicable in such a situation.

However, if the distributor is an individual, such a clause, together with other limitations of the distributor's independence, could imply the existence of an employment contract.

5 POST-CONTRACTUAL NON-COMPETITION OBLIGATION.

Is it possible to agree with the distributor an undertaking not to compete in the period after contract termination?

There is almost no space for clauses of this type, since EU antitrust law (and also Italian antitrust law, which must be interpreted according to the principles of European law) does not admit non compete obligations after contract termination with respect to distribution agreements.

If yes, is this obligation subject to specific conditions (i.e. time limit, special compensation for the distributor etc.)?

No limits are provided by Italian law.

Would the answer be different for a non-competition obligation regarding only

the actual customers of the distributor, linked to an obligation to make such customers available to the supplier? Would the non-competition obligation contained in Annex J (indemnity in case of termination) of the balanced IDI model be valid and effective under the law of your country?

It is not excluded that clauses linked to the transfer of goodwill to the supplier, such as the non-competition obligation contained in Annex J (indemnity in case of termination) of the balanced IDI model could be considered lawful, due to their more limited scope and to the fact that they are linked to a transfer of business (i.e. a context where clauses of this type are normally admitted if their duration is reasonable).

6. EXCLUSIVITY.

6.1 Rights of the distributor in the absence of contractual rules dealing with this issue.

If there is no written distribution contract or if the contract does not state anything about the distributor's exclusivity, does the distribution contract as such imply that the distributor is exclusive?

According to Italian case law the distributor's exclusivity cannot be implied from the contract itself[8]. So, if the parties entered into a distribution agreement without specifying that the distributor is exclusive, he will in principle have no exclusivity. However, in a recent decision of a low court[9], the appointment by the supplier of a new distributor in the distributor's area, just after having notified him the termination of the contract with 2 years' notice, was considered contrary to good faith, although the contract did not provided for any exclusivity right in favour of the distributor.

In case of negative answer, is there space for assuming that an exclusive right has been granted tacitly? Which circumstances (e.g. the fact that the distributor has always been the only purchaser) could support this assumption?

If it can be implied from the context that the parties' intention was to grant an exclusivity, the distributor may be considered as exclusive even in the absence of a specific clause[10]. So, if a distributor has been granted a territory for which he is responsible and a *de facto* exclusivity, it would be dangerous for the supplier to assume that there is no exclusivity, and consequently that he can appoint others for the same territory.

6.2 What is covered by the exclusivity.

Does the distributor's exclusivity mean that the supplier must not sell to customers of the distributor's territory? Does it also imply that the supplier may not sell to customers outside the territory who may resell into the distributor's territory and that he must take the necessary measures to avoid possible exports to the distributor's exclusive territory?

In principle the fact of granting an exclusivity to the distributor should imply that the supplier must not sell to customers established in the contractual territory but is free to sell to customers outside the territory, even if he knows or should know that they intend to resell the goods in the distributor's territory. However, in one

[8] Cass. 21 July 1994, n. 6819, *Basile v. Soc. Caffè Lunik,* in *Giur. it.,* 1995, I, 1, 381; Cass. 14/07/2004, n. 13079, in *Leggi d'Italia.*

[9] Trib. Milano No. 11799 of 22/11/2018, *Bergamo Diesel s.r.l.* v. *Hyundai Motor Company Italy s.r.l.,* unpublished.

[10] App. Cagliari, 11 April 2007, *C.I. S.p.A. in liq.* v. *S.I.I. Sistemi Integrati Informatici di L.L.,* in *Riv. Giur. Sarda,* 2009, 1, 37

case the Supreme Court has held that the exclusivity implies an obligation by the supplier not to sell to customers established outside the territory who resell into the distributor's exclusive territory[11]. This interpretation is rather surprising considering that, in order to comply with the distributor's exclusivity, the supplier should impose export prohibitions upon his customers, which would imply (at least within the European Community) a violation of the antitrust rules. In any case, considering this precedent, it is advisable to define very clearly the exclusivity in the contract in order to make clear that there is no obligation to protect the distributor against indirect sales (see, for instance, Article 16.2-A of the IDI model contract).

It is interesting to mention a judgment of the Tribunal of Bologna[12] where the Court excluded the supplier's liability for violation of the distributor's exclusivity by another distributor of the network, because the contract – making reference to the case of invasion of the exclusive territory by another distributor - only provided for the distributor's right to be indemnified by the relevant distributor and not by the supplier.

Are there rules (or case law principles) concerning supplier's direct sales to customers of the distributor's territory, made through the supplier's Internet website?

There are no rules or case law on direct sales by the supplier through Internet. In principle, direct sales to customers of the contractual territory should be considered as a violation of the distributor's exclusivity, provided that the customers to whom the supplier sells through Internet are potential customers of the distributor; by way of contrast, if the distributor acts as a wholesale reseller and the supplier sells to final consumers there would not be a breach of exclusivity.

6.3 Sole distributor/Exclusive distributor.

Does in your law (or case law) the term «sole distributor» have a precise legal meaning, distinguished from «exclusive distributor»? If yes, what is the difference?

Italian law does not distinguish between a sole distributor and an exclusive distributor.

6.4 Contractual limitations to the distributor's exclusivity.

Is it possible to delimit contractually the extent of the distributor's exclusivity, e.g. by permitting direct sales with payment of a commission or by reserving the supplier the right to supply certain customers?

Since no mandatory rule imposes to grant an exclusivity to the distributor, parties are free to allocate the distributor's exclusive rights as they wish. So, they may exclude certain customers or types of customers form the exclusivity, they may permit direct sales by the supplier at certain conditions (e.g. payment of commission) or in certain circumstances (e.g. period of notice). Of course, the clauses must be drafted clearly, so to avoid misunderstandings.

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[11] Cass. 9 April 1997, n. 3076, *Azienda Co. Vetraria srl v. Ormelvetro srl,* in *Giur. it.* 1998, 225 et seq. Also the Tribunal of Milan in a recent case (Trib. Milano No. 8631/2018 of 8/8/2018, *B.S. Beauty Service* v. *Silex Group s.r.l.,* unpublished) decided – although in the absence of any evidence of a direct involvement of the supplier and just based on the circumstances that its products were sold by two main supermarkets in the distributor's area – that the supplier had to "protect" the distributor in order for the exclusivity provision to be effective; however, finally the Court didn't grant any damage, stating that the distributor had not provided any evidence of the relevant damage.

[12] Trib. Bologna, 4 May 2012, *V. Arredamenti sas* v. *C. Group-Ali S.p.A.,* in *http://www.leggiditaliaprofessionale.it.*

Would Articles 16.3, 16.4 and 16.5 of the IDI balanced and supplier-friendly model contracts be in compliance with your legislation?

Articles 16.3, 16.4 and 16.5 of the IDI balanced and supplier-friendly model contracts are in compliance with the Italian legislation.

7. SALES OUTSIDE THE TERRITORY.

7.1 The possibility of limiting the distributor's activity to the territory

Does the legislation of your country allow the supplier to prohibit the distributor to sell outside the contractual territory? Does the legislation of your country allow the supplier to request the distributor to impose upon his customers a clause prohibiting them to sell outside the contractual territory?

If the distribution contract is capable of affecting trade between Member States of the EU, the answer would be clearly negative, because of the application of Article 101 of the EC Treaty on the Functioning of the European Union (TFEU). So, export prohibitions imposed upon an Italian distributor (as well as an obligation of the distributor to impose similar restrictions upon his customers) would be unlawful (except, perhaps, the case of export prohibitions to countries outside the EU). However, also in case of contracts only affecting domestic trade, prohibitions to sell in territories of other distributors could be considered unlawful, to the extent the above EC principles are considered applicable under the domestic antitrust law.

As regards the case of a contract with a foreign distributor, submitted to Italian law, it is likely that export prohibitions would be considered valid to the extent they do not significantly affect the Italian (or EC) market.

Would Article 11-B of the IDI balanced and supplier-friendly model contracts be considered in compliance with your legislation?

Article 11-B of the IDI balanced and supplier-friendly model contracts would not be considered in compliance with Italian law, except in case of contracts with distributors of countries outside the European Union.

7.2 Sales by the distributor through Internet.

Are there specific provisions (or case law) concerning the use of an Internet website by distributors? Would it be permitted, under the law of your country, to prohibit the distributor to propose the products of the supplier on his website?

There are no Italian rules nor case law on this issue. However, pursuant to European antitrust rules, the supplier cannot prohibit his distributor to promote his products and sell them through Internet, to the extent such promotion and sale is regarded as a “passive sale”.

Would it be permitted, under the law of your country, to prohibit the distributor to use the supplier's trademarks on his website unless authorised?

In principle yes. Of course this principle should be coordinated with antitrust law. A use of this right for the purpose of limiting the distributor's right to make passive sales through Internet (see EU Report, § 6.2.2) It is difficult to foresee how a Court would strike the balance.

Would Article 4.4 of the IDI model contracts be considered in compliance with your legislation?

In principle yes. There is no case law on this issue.

8. RESALE PRICE MAINTENANCE

Is there, in your legislation, any rule (e.g. antitrust rules) applicable to distribution contracts, prohibiting resale price maintenance? If yes, does such rule also cover the fixing of maximum prices?

Price maintenance is prohibited by domestic antitrust law, which contains rules equivalent to those of the TFEU.

Is Article 10 of the IDI balanced and supplier-friendly model contracts in compliance with your legislation?

In principle, Article 10 of the IDI balanced and supplier-friendly model contracts are in compliance with Italian law, since the Italian antitrust authority and Courts follow the EC rules and principles.

9. MINIMUM TURNOVER.

Clauses whereby the distributor undertakes to attain a given minimum turnover (normally on a yearly basis) are very frequent in distribution contracts subject to Italian law. Especially when an exclusive distributor requests a long term contract or a wide territory, the supplier will in exchange require a minimum purchase obligation. At the same time clauses of this type may be used (or abused) for the purpose of obtaining the maximum possible results from the distributor.

9.1 Clauses whereby the supplier may decide the minimum amount of turnover

Is a clause like Article 5.4 of the IDI supplier-friendly model be valid under the law of your country? Would the way the clause is applied be relevant for its validity?

In principle the clause should be valid. It is however likely that the principles regarding unilateral modification of the contract (see, above 3.3) also apply in case of unilateral determination of a minimum turnover the non-attainment of which justifies contract termination.

Considering that Article 5.4 makes reference to objective criteria, it is likely that the clause will be considered valid, provided it is applied in a fair way.

9.2 Consequences of non-attainment of the agreed minimum

If the parties have agreed on a minimum turnover to be attained by the distributor without fixing the consequences of such non attainment, would the supplier be entitled to terminate the contract without notice if the minimum turnover is not attained?

The answer depends on the specific situation. If the supplier is able to prove that the distributor's obligation is of such importance as to justify earlier termination, and provided the distributor's responsibility for the non-attainment can be established, the answer could be yes, but there is no certainty.

Would the supplier be entitled to claim damages because the distributor has not attained the minimum turnover?

In principle, yes. However, when other consequences of the non-attainment (such as contract termination) are expressly specified in the contract, it could be argued that the parties intended to cover only the consequences indicated (and therefore to exclude claims for damages).

Is the provision of Article 5.5 of the IDI balanced and supplier-friendly model contracts consistent with your legislation? In particular, would an earlier termination by the supplier for non-attainment of the minimum turnover be considered lawful by the Courts of your country?

In principle, yes. Courts tend to respect the choice of the parties to have the contract terminated if certain targets are not attained.

9.3 Possible justifications for not attaining the minimum turnover

Are there any principles in your law whereby a minimum turnover clause would not be applied if it would be unfair to do so?

It cannot be excluded that in very exceptional cases (e.g. if the distributor proves that he had been forced to accept unreasonably high levels of turnover or that the supplier is actually responsible for the non-attainment) the application of the clause could be considered to be against good faith. To the best of our knowledge, there are, however, no judicial cases on this line.

In a case regarding the distribution of cars[13] the Supreme Court held that the exercise by the supplier of the right to make direct sales to end users (in the specific case to the employees of its factory situated near to the distributor), although permitted under the distribution contract, could in particular circumstances justify the non-attainment by the distributor of the agreed minimum turnover.

10. LIABILITY FOR DEFECTS, PRODUCT LIABILITY ETC.

10.1 General liability for defects arising out of the contract of sale

Does your law admit clauses which limit the supplier's liability for defects (non conformity) of the products supplied to the distributor? Would Article 15.1 of the IDI supplier-friendly and balanced model be valid - in whole or in part- under your national legislation?

Yes, provided the general rule of Article 1229 of the civil code, where-under no limitation of liability is admitted in case of fraud or gross negligence («dolo» and «colpa grave»), is respected.

Article 15.1 of the IDI supplier-friendly and balanced model contracts are valid under Italian law.

10.2 Product liability

In general

Do you have specific rules (or principles established by case law) on product liability?

Yes. Articles 114 *et seq.* of the Consumer Code (*Decreto legislativo* of 6 September 2005, n. 206, subsequently amended).

If yes, who is the person against whom a product liability claim can be made (producer, importer, supplier putting his trademark on the product)?

Pursuant to Article 116 of the Consumer Code, when the manufacturer is not identified (or when the product is imported in the EU), the supplier who has distributed the product in the exercise of a commercial activity, is deemed responsible, if it failed to inform the injured person, within a period of three

[13] Cass. 9 December 2003, n. 18.743, *S.C.A. Commercio Autoveicoli v. Fiat Auto SpA,* in *Dir e Giust.*, 2004, 4, 101

months from the request, about the identity and address of the manufacturer or of the person who supplied him with the product.

Clauses limiting the supplier's liability

Are clauses which limit or exclude the responsibility for product liability of the supplier towards a distributor admitted under your law?

Italian law admits contractual limitations of liability in this field, except towards the injured party. So, it is in principle possible to limit the supplier's liability towards the distributor, which does not exclude - of course - that the injured party may make a direct claim against the supplier.

Would Article 15.4 of the supplier-friendly IDI model be valid and effective under the law of your country?

Article 15.4 of the supplier-friendly IDI model is valid and effective under Italian law, but within the limits of Article 1229 of the civil code (i.e. not in case of fraud or gross negligence of the supplier) and provided the damaged party is not the distributor himself.

Would Article 15.4 of the balanced IDI model be valid and effective under the law of your country?

Article 15.4 of the balanced IDI model is valid and effective under Italian law.

Clauses limiting the distributor's liability

Would Article 15.1 of the distributor-friendly IDI model be valid and effective under the law of your country?

Article 15.1 of the distributor-friendly IDI model is valid and effective under Italian law, as regards the hold harmless obligation of the supplier. Of course, if the distributor is responsible towards the damaged party (pursuant to the rule provided under the above mentioned Article 116 of the Consumer Code) he cannot avoid the liability towards the damaged party, but he will be able to revert to the supplier.

10.3 Right of redress under European directive 1999/44/CE on guarantees to consumers (only applicable to EU countries).

Would clauses 15.3 of the supplier-friendly IDI model and 15.3 of the balanced IDI model be valid and effective under the law of your country?

In principle, clauses 15.3 of the supplier-friendly and balanced IDI model are valid and effective under Italian law, since Article 131 of the Consumer Code (which implements the above directive) expressly allows the parties to limit or waive the right of redress.

Please, note that Directive 1999/44/CE will be repealed by the new Directive 2019/771 of 20/05/2019 as of January 1st, 2022 and will have to be implemented by the EU Member States on July 1st, 2021 at the latest. We will of course check the compliance of Article 15.3 of the IDI model contracts with the new Italian rules as soon as they will be introduced.

11. STOCK OF PRODUCTS.

11.1 Return of the products in stock

Are there any special rules (or principles established by the courts)

whereby the supplier would have an obligation to repurchase the stock in whole and in part?

At present there are no rules nor case law on the issue of the return of the stock upon contract termination. However the principle of good faith could be applied in extreme cases (e.g. if the supplier convinces the distributor to purchase huge quantities of products just before terminating the contract). It is very important to regulate these aspects specifically in the contract.

Is Article 14.2 of the supplier-friendly and balanced IDI contract valid and effective under your law?

Article 14.2 of the supplier-friendly and balanced IDI contracts is valid and effective under Italian law.

11.2 Consignment stock

Is it frequent in your country to give the local distributor a consignment stock of products remaining the property of the supplier?

In Italy it is not frequent to give the local distributor a consignment stock of products remaining the property of the supplier.

12. RESERVATION OF TITLE.

Is reservation of title valid and effective under the law of your country? Would Article 9.6 of the IDI balanced model contract, as well as Article 9.5 of the supplier-friendly model contract, be fully effective in your country?

Reservation of title (ROT) clauses are seldom used with distributors. They are almost always ineffective, for the reasons shown hereunder.

In order to be effective, pursuant to Article 1524 of the civil code, a ROT clause must be in writing and must have a "certain date" (i.e. a date that is proved), which must precede the date of the seizure by the buyer's creditors, or the date of the bankruptcy. The most common method to prove the date is that of registering the sales contract.

In any case, if the goods are not specifically individuated in the document having a certain date (so that they can be clearly distinguished from other goods in possession of the distributor) the reservation of title will be ineffective and not opposable to third parties[14] nor to the bankruptcy[15]. In the past, the position of Italian Courts was quite strict in this respect: the reservation of title included in the distribution agreement regarding future sales of products which were not yet specified was not considered effective[16]. More recently, some lower Courts seem to consider that, when Article 11.3 of Legislative Decree No. 231 of 9-10-2002 (which has introduced less restrictive requirements in application of the EC Directives) applies, it would be sufficient that the ROT clause is included in the distribution contract, without the need to mention it in the relevant sales contracts; however, there is not a unanimous position of Italian case law, so far[17].

Finally, according to Article 11.3 of Legislative Decree No. 231 of 9-10-2002 (sub-

[14] Cass. 7 April 2005, n. 7275, *Ford Italia spa* v. *M.R.*
[15] Cass. 28 August 1995, n. 9035, *Ford italiana spa v. Fallimento Giorgio Garbin,* in *Dir. fall.,* 1996, II, 851.
[16] See also Cass. 17 December 1990, n. 11960, *Ford italiana spa v. Fallimento Automarengo,* in *Giur. it.,* I, 1, 773; Cass. 20 May 1994, n. 4976, *Fall. Medioli e Querci v. Alfa Lancia,* in *Foro it.,* 1995, I, 893; Cass. 22 October 2002, n. 14.891, *Ford Italiana SpA v. Fall. Ilvo Toninelli,* in *I contratti,* 2003, 583; Cass. 7 April 2005, n. 7275, *Ford Italia SpA v. M.R.,* in *Foro Pad., 2006, 1, 35;* Cass. 19 February 2010, n. 3990, *Fallimento della Silvio Cestari s.r.l. v. Nissan Italia s.p.a.,* in www.leggiditalia.it
[17] See App. Venezia, 19 May 2017, and – in the opposite sense – App. Firenze, 19 January 2017; both in www.leggiditalia.it

sequently amended), ROT clauses subject to the requirements specified above, must also be confirmed in all specific invoices of the subsequent supplies, having certain date, preceding the seizure of the debtor's goods, and registered in the account books of the company.

13. OBLIGATIONS REGARDING THE SUPPLY OF INFORMATION TO THE OTHER PARTY

Article 8 of the IDI distributor-friendly model provides a general obligation of the distributor to inform the supplier about his activity and market conditions, upon request of the latter. Pursuant the law of your country, has the distributor more burdensome and/or more specific obligations to inform the supplier?

Since there are no legal rules governing the distribution contract, no specific obligations of this type exist.

On the other side, Article 17 of the IDI supplier-friendly model does not contain any obligation of the supplier to inform the distributor. Pursuant the law of your country, has the supplier more burdensome and/or more specific obligations to inform the distributor?

In principle not. Of course in extreme cases the fact of not giving information which the distributor needs for performing his obligations could amount to a breach of the principle of good faith.

14. SUPPLIER'S TRADEMARKS

According to the law of your country is it sufficient that the supplier simply authorises the distributor to use his trademark (or other proprietary rights) in the context of his promotional activity, or is it necessary for the parties to sign a separate licence agreement for that purpose?

Since it is permitted to use the trademark for advertising the products one has purchased, there no need to give a license to the distributor. The main purpose of clauses of this type is not to enable the distributor to use the trademark, but to limit his right to do so.

In case the distributor registers in your country the supplier's trademark, in breach of Article 12.2 of the IDI balanced and supplier-friendly model contracts, shall this clause allow the supplier to obtain the cancellation of such registration?

Under Italian law an agent cannot register the trademark of his principal, without the approval of the latter. Should the agent nevertheless register the principal's trademark in Italy, the principal is entitled to obtain the transfer of such right from the agent to himself (Article 6 *septies* of the Paris Convention for the Protection of Industrial Property, of March 20, 1883 – Cass. 17-3-2000/3100). Although this principle expressly established for agents is often extended to distributors in other European countries, some Italian courts follow a stricter approach and do not consider it applicable to distributors. To the best of our knowledge, the Supreme Court has not solved the conflict of decisions in this respect, so far.

15. TERM AND TERMINATION OF THE CONTRACT.

15.1 Contract for a fixed period with automatic renewal.

Is a clause, contained in a contract for a fixed term, providing that the contract will be automatically renewed for a further term and so on (like Article

18, alternative B, of the IDI models) admissible under the law of your country? Or would a contract of this type be converted into a contract for an indefinite period?

If the automatic renewal clause is admissible, may the successive contracts be considered all together as one contract (e.g. for calculating the goodwill indemnity, where provided, or for determining a minimum period of termination notice)?

Contracts with automatic renewal are admitted. The Italian Supreme Court, with reference to continuative supply contracts ("contratto di somministrazione") confirmed that, in such a case, the contract shall continue for the period provided at the same terms initially agreed upon, as an effect of the initial will of the parties (Cass. 28/7/2005, n. 15797). This principle has been also considered applicable to distributorship contracts (see, for instance, Trib. Bologna, 20/1/2015).

15.2 Contract for a fixed period (without automatic renewal clause) which continues to be performed after its expiry.

What happens, under your law, if a contract concluded for a fixed term (and not containing a clause for automatic renewal) continues to be performed after its term?

The Italian Supreme Court, in the abovementioned decision (Cass. 28/7/2005, n. 15797) confirmed that in such circumstances the contract will tacitly renew for the time provided by the parties or by common usages or for an undetermined period of time, and it will be subject to the same terms and conditions initially agreed upon by the parties, except in case of express contrary will of the parties or contrariness with the law (Trib. Bologna, 20/1/2015 applied such principle to a distributorship contract).

15.3 Termination notice (contract for an indefinite period).

Does the legislation of your country require a minimum period of notice for the parties to terminate a distribution contract made for an indefinite term? If yes, is such period mandatory? For both parties? If no period of notice is required by law, will it be fixed by the courts?

In the latter case, will the courts intervene only if no period of notice has been agreed contractually? Or will the courts establish a reasonable period if the period agreed in the contract is considered too short?

The Courts require a reasonable notice applying by analogy article 1569 of the civil code on supply agreements or article 1725 on the contract of mandate which both make reference to an appropriate notice («congruo preavviso»). Thus, if the parties have not indicate the period of notice in the contract, the Court will fix an appropriate period. However, there is not a clear indication in this respect provided by Italian Courts: in one case one and half year was considered appropriate in a contractual relation which lasted for 25 years; in another case, one year for a contract lasted for 10 years; in a further case, six months for a contract lasted for 12 years, etc. Some Courts apply analogically the period of notice provided for the commercial agents also to distributors.

If the parties have provided the period of notice in the contract the Courts tend to respect their choice, even if the period is short. So, for example, contractual period of notice of 15 days has been admitted in one case[18].

This approach has always been followed by Italian case law also with regards to

[18] Tribunal of Torino, 15 September 1989, *Gioia* v. *Società Italiana Gervais Danone,* in *Giur, it.,* 1991, I, 1, 834; Cass. 17 June 2011, n. 13394.

the possible reasons for terminating, i.e. in case of termination by notice, Italian courts have always refrained from evaluating the specific reasons of termination, being sufficient that the period of notice provided for in the contract had been respected.

However, the Italian Supreme Court in a now famous judgment[19] stated a general principle pursuant to which, the contractual provision which grants the supplier the right to terminate the distribution contract by notice, does not exclude the right of the courts to evaluate if such right has been exercised in accordance with the principle of good faith; otherwise it can be regarded as an abuse of right.

This judgment is disputable specially considering the facts which were on the basis of the dispute[20].

The proceeding was started by an association created by a number of former Renault distributors against their supplier, who terminated the relevant contracts by notice. Notwithstanding the fact that Renault terminated the contracts in compliance with the term of notice (of one year) provided both in the contract and in the European antitrust rules applicable at the time, the distributors argued that Renault had abused of its right, because its actual aim was not to restructuring its network but, instead, to "place" some of its former managers at their place, while they relied in the continuation of their contractual relationship.

Both the Tribunal and the Court of Appeal of Rome rejected such claim, because it was unfounded and not supported by any prove. However, the Supreme Court stated the above mentioned principle without taking into account the total lack of grounding of the claimants' argument.

In 2017, the Court of Appeal of Rome issued its decision which had to apply the principle stated by the Supreme Court in the same Renault case and interpreted it in a narrower way than the Supreme Court, i.e. stating that Courts shall not evaluate the reasons of the termination, since otherwise they would transform the termination “ad nutum” in a termination by cause; however, they can evaluate the *bona fide* in assessing the way in which the termination was performed. In practice, the Court, by evaluating the specific situation of each distributor, granted damages in most cases, either when it found that the distributor was asked to make specific investments just before termination, and when the supplier had given an expectation of continuation of the contractual relationship for a further period of time[21].

Following the abovementioned case, several distributors - particularly in the automotive sector - attempted to challenge terminations made by their suppliers in most cases in compliance with the notice periods provided by the EU antitrust Regulations in force at the time of the relevant disputes. Notwithstanding the principle established by the Supreme Court, in most cases the claim brought by the distributors (all based on an alleged violation of the principles of good faith, abuse of right, abuse of economical dependence, abuse of dominant position (!) were rejected[22].

[19] Cass. 18 September 2009, n. 20106, *A.G. e altri* v. *Renault Italia S.p.A.*

[20] Trib. Roma 1° June 2001; App. Roma 13 January 2005, n. 6835/2002.

[21] App. Roma, 24/10/2017. A similar approach was followed by Trib. Bologna, 20/1/2015.

[22] See, for instance, a decision of the Supreme Court in a case between Ford and a former distributor, in which the Supreme Court declared the termination made by Ford as lawful, since the supplier provided the distributor with a 24 months’ notice in compliance with Regulation 1475/1995 (applicable to the dispute), justifying its decision by the need to reorganize the network; The Supreme Court rejected all claims brought by the distributor based on the alleged abuse of economic dependence and violation of good faith (Cass. No. 25606 of 12/10/2018). The same approach has been followed by The Court of Appeal of Rome (decision No. 2989 of 8/5/2019) in a case between Mercedes Benz Italia S.p.A. and one of its distributors. See also Trib. Roma No. 10435/2019 of 17//5/2019, *Emme Emme S.p.A. in Fallimento* v. *Mercedes Benz Italia S.p.A.,* not published. Trib. Torino No. 3964/2018 of 16/8/2018*, Milauto S.p.A.* v. *Suzuki Italia S.p.A.,*

According to your legislation, is the notice period deemed to be observed in case of payment of an equivalent sum of money by the supplier to the distributor? How is it calculated by courts?

A clause permitting to pay a sum of money instead of giving a termination notice should be valid, if the sum is reasonable. In the absence of such a clause, a court would consider the supplier responsible for the damage caused to the distributor by the earlier termination: the main criterion for assessing such damage will be the earnings the distributor would have had during such period.

15.4 Form of the notice of termination and effectiveness.

Is there a form (e.g. registered letter) that must be respected for the termination notice to be effective?

No. But it is of course recommended to use a means of communication which can prove that the notice has been received and when.

Is the termination considered to have been validly given when it is sent or when it is received?

When it is received.

If the addressee is a company, is there a specific person to whom the notification must be made in order to be effective?

No. The notice is deemed to be received when it reaches the address of the addressee (Article 1335 civil code).

In case the form imposed by law or prescribed in the contract (see for example Article 20 of the IDI model) has not been respected, what are the consequences?

In this case the notice will be without effect.

15.5 Earlier termination.

Most legal systems recognise the right of a party to terminate a long term («duration») contract without notice (or before its term, if the contract is for a fixed period) in case of situations which do not permit to continue carrying out the relationship on a mutual confidence basis and in particular in case of a material breach by the other party. How is this principle applied in your country with respect to distribution contracts?

Italian law recognises the right of a party to terminate a long term contract (duration contract, «contratto di durata») without notice (or before its term, if the contract is for a fixed period) in case of situations which do not permit to continue carrying out the relationship on a mutual confidence basis and in particular in case of a material breach by the other party.

Which reasons can normally justify earlier termination by the distributor and/or by the supplier?

By the distributor: substantial breaches of the supplier, like repeated and unjustified lack of supply, breach of exclusivity.

By the supplier: breach of the obligation to pay the goods; distribution of competing products (if there is a non-competition clause).

In one case[23], the Supreme Court confirmed the decision of a lower Court, ac-

not published; App. Roma No. 4215/2019 of 21/6/2019, *CAM Center s.r.l.* v. *Chrysler Italia s.r.l.,* unpublished.

[23] Cass. 23 January 2006, n. 1227, *Soc. Fodea* v. *Chi Bo*, in *JurisData, sent. cass. civ.*

cording to which the fact that the distributor has not increased sales proportionately to the market capacity of the territory, amounts to a breach which can justify termination for cause. This reasoning was followed by a lower Court (Trib. Bologna, 20/1/2015), in a case of a drastic drop of sales (of 50%) by a distributor in one year and a further drop in the following year; the Court considered the termination by the supplier justified also comparing such results with the sales achieved in the following year by a new distributor appointed by the supplier.

Is it necessary that termination for breach is notified within a short period after the breach is discovered?

Earlier termination should be notified to the other party within a reasonably short period after its discovery.

Can a party terminate the contract for a breach which such party has tolerated in the past without complaining?

In principle the answer is no, particularly if the previous conduct shows that the parties did not attach importance to the respect of a certain clause, but the solution may vary from case to case. So, for example, a party may prove that it tolerated certain breaches trusting that the other party would remedy and that it was forced to terminate the contract when the breach became unbearable.

If the answer is no, would the result be different if the contract contains a «waiver clause » (e.g. a clause saying that «Any waiver on the part of either party hereto of any right or interest shall not imply the waiver of any other right or interest, or any subsequent waiver»)?

Difficult to say. However, if the clause is very general (i.e. if it does not refer to a specific breach) the waiver clause would probably not be effective if its application would go against the principle of good faith. On the contrary, a clause referring to a specific situation (e.g. a clause saying that the fact of not making use of the possibility of terminating the contract when the minimum amount of orders is not attained does dot prejudice the principals right to make use of the clause in the future) would certainly be more effective.

15.6 Unjustified earlier termination.

What is the effect of an unlawful earlier termination of a distribution contract under the law of your country? Does the contract remain in force until a further valid termination notice is given by one of the parties, or does the contract end anyhow (and the terminating party will be responsible for the damages arising out of the unlawful termination)?

It is not clear if in case of unlawful earlier termination the contract continues (or if no termination notice had been given) or if it comes nevertheless to an end, but the terminating party must compensate the damage suffered by the terminated party. In any case it does not make much difference since the terminated party would in any case have difficulty to obtain from the other party the actual continuation of performance.

In any case, by using clause 19.6/19.5 of the IDI model contracts any problem should be solved because an unjustified earlier termination would in any case be considered as effective with payment of a termination indemnity (see § 15.7 below).

15.7 Compensation for unjustified earlier termination.

Please, explain if there are legal rules (or principles established by case law) for calculating the amount of compensation for unjustified earlier termination.

The general principles on calculation of damages apply. Thus the damage will be calculated with reference to the earnings the distributor would have made during the period the contract would have continued in the absence of the unlawful termination, i.e. for the period of notice if it is a contract for an indefinite period or until the final term if it is a contract for a fixed term. Also possible investments made by the distributor for the purpose of performing the contract may be considered.

Would Article 19.6 of the balanced and the supplier-friendly IDI model contracts and Article 19.5 of the distributor-friendly IDI model contract be valid under the law of your country?

Article 19.6 of the IDI balanced and the supplier-friendly model contracts, as well as Article 19.5 of the IDI distributor-friendly model contract are valid under Italian law.

16. GOODWILL COMPENSATION (INDEMNITY).

Does the law or jurisprudence of your country recognise a goodwill compensation to the distributor?

No goodwill compensation is foreseen under Italian law. If the contract is lawfully terminated the distributor has no right to indemnity, whatever the importance of the goodwill created. Italian Courts have excluded in several cases the analogical application of the rules on goodwill indemnity applicable to commercial agents[24].

Only in case of breach by the supplier (e.g. unjustified earlier termination) the distributor will be entitled to recover damages.

17. LIMITATION OF ACTION

Does your legislation provide limitation periods (or similar systems) for the exercise of the rights of the parties under the distributorship agreement and which is their duration?

The rights under the distribution agreement fall under the general prescription term of 10 years.

Can the limitation periods be contractually modified according to your law?

No.

18. APPLICABLE LAW.

18.1 Legal sources.

What are the rules of your legal system concerning applicable law to distribution contracts?

As regard contracts concluded between parties of EU Member States, the EC Rome I Regulation applies to contracts concluded after December 17, 2009,

[24] See, for instance, Cass. 3 October 2007, n. 20775, *Soc. Sidra* v. *Soc. Bosh;* Cass. 18 September 2009, n. 20106, *A. G. e altri Œ v. Renault Italia spa;* Trib. Bologna, 4 May 2012, *V. Arredamenti sas* v. *C. Group-Ali S.p.A.,* in *http://www.leggiditaliaprofessionale.it.*

while the Rome convention of 1980 applies to contracts concluded before that date as well as to contracts with Danish parties.

18.2 Applicable law in the absence of choice

If there is no choice of law by the parties, which criteria are used by the courts of your country for determining the applicable law in case of a distribution contract with a foreign counterpart?

In cases where the 1980 Rome Convention is applicable, Italian courts will apply the law of the place where the party that provides the characteristic performance is domiciled: it is not clear if Italian courts would consider as characteristic the distributor's activity (and thus apply the law of the country where the distributor is domiciled) or the supplier's activity. In one case[25] the latter approach has been taken. In another case[26] the Supreme Court, although considering the contract as a supply agreement, held that there was a close connection to the distributor's country where the exclusivity clause was to be observed, and consequently applied the law of the distributor's country.

In two other cases the Supreme Court has considered the supply of goods to be the prevailing aspect and thus applied the law of the supplier's country[27].

On the contrary, Regulation Rome I expressly provides for the application of the law of the place where the distributor is domiciled (Article 4, f)).

18.3 Effectiveness of a choice of law excluding the law of the distributor's country

Is it possible to submit a distribution contract with a party belonging to your country to the law of a foreign country?

In Italy it is possible to submit a distribution contract with an Italian party to the law of a foreign country. The relevant rules are: Article 3 of the Rome convention of 1980 and Article 3 of Regulation Rome I.

Is it possible to submit a distribution contract to principle generally recognised in the international trade (i.e. «lex mercatoria»), avoiding the application of national laws?

It is doubtful whether the Italian Courts would accept the submission of a distribution contract to principles generally recognised in the international trade (i.e. «lex mercatoria»), avoiding the application of national laws. It is not excluded that the Courts could consider the clause as implying no choice of law and consequently apply Article 4 of the Rome Convention/Regulation.

Does your legal system contain provisions on distribution law considered as «international public policy» (loi de police), i.e., applicable even where the parties choose to submit the contractual relationship to the law of a foreign country?

There are, to our knowledge, no rules regarding distribution contracts, which may be considered as «norme di applicazione necessaria», «loi de police», «internationally mandatory rules».

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[25] Cass. 14 December 1999, n. 895, *Imperial Bathroom Company* v. *Sanitari Prozzi Spa,* in *Riv. dir. int. priv. proc.,* 2000, 1078, where the purchase of the products has been considered as the characteristic obligation and the law of the place of delivery of the goods has been applied.

[26] Cass. 6 August 1998, n. 7714, *BS Electrodomesticos* v. *Fall. Sicentecnica,* in *Riv. dir. int. priv. proc.,* 1999, 583.

[27] Cass. 11 June 2001, n. 7860, Otto Kogler v. Eurogames srl, in *Riv. dir. int. priv. proc.,* 2002, 157; Cass. 20 September 2004, n. 18.902, *Kling & Freitag GmbH v. Società Reference Laboratory srl,* in *Riv. dir. int. priv. proc.,* 2005, 443.

18.4 Application by the courts of your country of foreign rules having «internationally mandatory» character.

If the contract with a foreign distributor contains a choice of law clause which provides for the application of the law of your country and assuming that some provisions of the law of the distributor's country are «internationally» mandatory (see § 3.2 of the Law and Jurisdiction Report) would the courts of your country take these rules into consideration, and if yes, to what extent?

Italian courts could take rules of this type in consideration (e.g. in case of a contract with a Belgian distributor submitted to Italian law), in compliance with Article 7 of the Rome I Convention. To the best of our knowledge, however, there are no cases where such rule has been applied to foreign distributors. Pursuant to Article 9.3 of Regulation Rome I, the application of those rules is only admitted if it leads to an illicit performance of the contract.

19. JURISDICTION AND ENFORCEMENT OF FOREIGN JUDGMENTS.

19.1 Legal sources.

What are the rules of your legal system concerning jurisdiction as well as recognition and enforcement of foreign decisions?

As regards contracts with parties of the European Union, EC Regulation 1215/2012 of the Council of 12 December 2012 will apply. In the relations with Norway, Iceland and Switzerland the Lugano Convention of 2007 will apply.

With respect to distribution contracts with parties of other countries the «general» rules on jurisdiction and enforcement of foreign judgements contained in the law on private international law of 31 May 1995, n. 218 applies.

19.2 Jurisdiction without a choice of jurisdiction clause

If there is no valid jurisdiction clause, is a distributor of your country entitled, under the procedural rules of your country to bring a claim before his courts against a foreign supplier?

If the other party is established within the EU, Article 7, n° 1, of Regulation 1215/2012 will apply. If the Court considers the contract as a contract where the distributor provides a service, it will apply the law of the country where the distributor is domiciled. If, on the contrary, the court considers it as a supply agreement the applicable law will be determined with respect to the place of delivery of the goods[28].

If the other party is established in a country outside the EU Article 5, n. 1 of the Brussels convention will in principle apply, as per reference made by Law 218/1995[29]. In this case the Courts which consider the distributor's activity as characteristic performance will apply the law of the distributor's country and those which look at the supply side, will apply the law of the supplier's country[30].

[28] See, for instance, Cass. 20 September 2004, n. 18.902. See also Cass. 6 July 2005, n. 14208, *Vtech Electronics Europe BV* v. *Editrice Giochi spa,* in *Riv. dir. int. priv. proc.,* 2006, 447, which applied Regulation 44/2001. In this judgment the Supreme Court, with reference to a contract between a Dutch supplier and an Italian distributor, maintains its jurisdiction, because the contract fixed the place of delivery at the distributor's warehouse in Italy.

[29] According to the Italian conflict of law rules (Law 118/1995) the jurisdiction is determined according to the rules of the Brussels convention and successive modifications. Since it is not clear if Regulation 215/2012 should be considered as a modification of the Brussels convention the question is still open whether one should refer to Regulation 215/2012 or to the Brussels convention.

[30] So, in a case where the Brussels Convention was applicable (Cass. 18 February 2002, n. 14.837,

More recently, the Italian Supreme Court seems to have established a general principle (followed by lower Courts) pursuant to which the supplier/grantor's obligation to supply the products to the distributor is to be regarded as the characteristic performance of the distribution contract, while the exclusivity and the other distributor's obligation are merely accessory to the supply obligation[31].

The Corman Collins decision[32] and the Granarolo decision[33] of the European Court of Justice, should also be considered in this regard.

More recently, the European Court of Justice also decided on a case in which the alleged distributor was performing its activity in a Member State other than the one in which he and the supplier were based and concluded that the jurisdiction should be (i) that of the Member State in which the place of the main supply of services, as is clear from the provisions of the contract and, (ii) in the absence of such provisions, the actual performance of that contract, and (iii) where it cannot be determined on that basis, the place where the agent is domiciled[34].

If there is no valid jurisdiction clause, is a supplier of your country entitled, under the procedural rules of your country to bring a claim before his courts against a foreign distributor?

It depends on the case by case evaluation. If the court considers the agreement as a supply contract it may affirm its jurisdiction arguing that the seller's obligations are to be performed in the seller's country (under Article 5, n° 1 of the Brussels Convention)[35] or that the goods were to be delivered in the seller's country (under Article 7, n° 1, of Regulation 1215/2012).

19.3 Effectiveness of a jurisdiction clause in favour of foreign courts

Do judges of your country have exclusive jurisdiction to settle disputes concerning distributors, who carry out their activity between the boundaries of your country?

Italian Courts have not exclusive jurisdiction to settle disputes concerning distributors, who carry out their activity in Italy.

Would a clause contained in a contract between a foreign supplier and a distributor of your country under which a foreign court has jurisdiction on disputes arising out of the contract be valid in your country?

In principle, a clause contained in a contract between a foreign supplier and an Italian distributor under which a foreign court has jurisdiction on disputes arising out of the contract is valid under Italian legislation.

Janssen Cosmetical Care v. Munda Alberto, in *Nuova giur. civ. comm.,* 2003, I, 230*)* the Supreme Court considered the delivery of the goods to be the relevant obligation and recognized the jurisdiction of the courts of the German supplier. In another case (Cass. 30 June 1999, No. 366, *ETS. Payen et CIE S.A.* v. *FKI – Fai Komatsu Industries S.p.A*. in *Riv. Dir. Internaz. Priv. e Proc.,* 2000, 738), in which an Italian supplier started a legal proceeding against his French distributor, claiming the lack of attainment of the minimum turnover, the Italian Supreme Court denied jurisdiction stating that that obligation was to be performed in France.

[31] Cass., 20 September 2004, n. 18902, *Kling & Freitag Gmbh s.r.l.* v. *Societa' Reference Laboratory s.r.l.* in *Foro it.,* 2005, 1, 3420; Cass., 6 July 2005, n. 14208, *Vtech Electronics Europe* v. *Editrice Giochi S.P.A,* in *Mass. Giur. it.,* 2005 CED Cassazione, 2005; Cass., 4 May 2006, n. 10223 *Fallimento Manifatture Natlacen s.r.l.* v. *ETS. Hallette S.A.S., Dentelle Berthe S.A., Dentelle Sophie Hallette S.A.S* in *Mass. Giur. it.,* 2006 CED Cassazione, 2006.

[32] European Court of Justice, December 19, 2013, Case C-9/12, *Corman-Collins SA* v. *La Maison de Whisky SA,* already examined in the previous paragraph 2.3.

[33] European Court of Justice, 14 July 2016, Case C-196/15, *Granarolo SpA* v *Ambrosi Emmi France SA.*

[34] European Court of Justice, 8 March 2018, Case C-64/17, *Saey Home & Garden NV/SA* v *Lusavouga-Máquinas e Acessórios Industriais SA.*

[35] See, for instance, Cass. 3 April 2000, n. 84, *Bellini GmbH* v. *Stefin spa – Stefin spa* v. *Bellini GmbH,* in *Riv. dir. int. priv. proc.,* 2001, 395.

This is certainly the case if EC Regulation 1215/2012, Brussels or Lugano conventions are applicable, since they recognise the validity of clauses on jurisdiction and prevail over possible domestic rules, which provide otherwise.

If the parties choose a contractual forum outside the countries where the above regulation or conventions apply, reference must be made to Article 4/2 of the law on private international law of 31 May 1995, n. 218, which says that Italian jurisdiction can be validly derogated in favour of foreign courts or arbitration if the clause is proved in writing and the dispute regards rights of which the parties can dispose («diritti disponibili»). Since the issues involved in a distribution contract regard rights of which the parties can dispose, there should be no problems.

Would a clause contained in a contract between a foreign distributor and a supplier of your country under which a foreign court has jurisdiction on disputes arising out of the contract be valid in your country?

The first step in order to enforce a foreign decision in Italy is to obtain an enforcement decree from the competent Court of Appeal: this stage takes approximately six months.

Then, if the other party make an opposition against such decision, the proceedings may continue for other two/three years before the Court of Appeal and for a further year, if recourse before the Court of Cassation.

19.4 Recognition - enforcement.

Is it possible to recognise and enforce a foreign judgment against citizens of your country? Is recognition or enforcement subject to particular limits or conditions? Which ones?

Recognition of foreign judgements in Italy is possible, under the rules listed under § 19.1 above, according to the circumstances of the case.

If EC Regulation 1215/2012, the Brussels or Lugano conventions are to be applied, reference must be made to the relevant provisions of such texts.

If domestic Italian rules are to be applied (i.e. for judgements of other countries) reference must be made to Article 64 of the law on private international law of 31 May 1995, n. 218, according to which:

A judgement rendered by a foreign authority shall be recognised in Italy without requiring any further proceedings if:

1. the authority rendering the judgement had jurisdiction pursuant to the criteria of jurisdiction in force under Italian law;
2. the defendant was properly served with the document instituting the proceedings pursuant to the law in force in the place where the proceedings were carried out, and the fundamental rights of the defence were complied with;
3. the parties proceeded to the merits pursuant to the law in force in the place where the proceedings were carried out, or default of appearance was pronounced in pursuance of that law;
4. the judgement became final according to the law in force in the place where it was pronounced;
5. the judgement does not conflict with any other final judgement pronounced by an Italian court or authority;
6. no proceedings are pending before an Italian court between the same

parties and on the same object, which was initiated before the foreign proceedings;

7. the provisions of the judgement do not conflict with the requirements of public policy *(ordre public).*

If enforcement is possible, how long does the proceeding take?

The first step in order to enforce a foreign decision in Italy is to obtain an enforcement decree from the competent Court of Appeal: this stage takes approximately six months.

Then, if the other party make an opposition against such decision, the proceedings may continue for other two/three years before the Court of Appeal and for a further year, if recourse before the Court of Cassation.

20. ARBITRATION.

20.1 Legal sources.

Is your country part of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)?

Italy is part of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958).

Are there other rules applicable to international arbitration provided by the law or jurisprudence of your country?

Until March 2006 there was a distinction between domestic and international arbitration in Italy. Particularly, Articles 832-838 of the code of civil procedure governed international arbitration.

Legislative Decree 2-2-2006 n. 40 (in force since March 2, 2006) repealed Articles 832-838 of the code of civil procedure, which now apply to domestic arbitration only.

Articles 839-840 (still in force) regulate recognition and enforcement of foreign arbitral awards.

20.2 Arbitrability.

Are distribution contracts considered a subject matter capable of settlement by arbitration, according to your legislation? If yes, does this apply to all distribution agreements or only to certain situations (e.g. distributors who are not physical persons)?

There should be no doubts on the arbitrability of distribution contracts. There has been some discussion about the applicability to distributors of the rules governing the labour process («processo del lavoro»), which apply to agents / individuals not having an important organisation (see Report on commercial agency), and which reserve an exclusive jurisdiction to «labour courts», but the Courts have decided that these rules cannot be applied to distributors (buyers-resellers).

20.3 Arbitration clauses.

Would an arbitration clause providing for arbitration abroad, contained in a distribution agreement be valid in your country? Would the courts of your country refuse jurisdiction with respect to an distribution contract containing such a clause?

An arbitration clause providing for arbitration abroad, contained in a distribution

agreement is valid under Italian law. Italian Courts would refuse to accept jurisdiction with respect to a distribution contract containing such an arbitration clause (unless the clause is invalid, obviously, e.g. because not in writing).

20.4 Recognition of foreign awards.

Would a foreign arbitration award dealing with a distribution agreement be recognised by the courts of you country?

A foreign arbitration award dealing with a distribution agreement will be recognised by Italian Courts, provided the conditions of the New York Convention are met.

LIST OF CLAUSES THAT MIGHT NOT BE FULLY EFFECTIVE OR THAT SHOULD BE DELETED OR MODIFIED

Clause	Model	Advice
11-B	balanced and supplier-friendly model contracts	The clause would not be considered in compliance with Italian law, except in case of contracts with distributors of countries outside the European Union.